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No. 852

In the Supreme Court of the United States

OCTOBER TERM, 1969

HYMAN STERNMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys,

Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Collins v. *Loisel*, 259 U.S. 309	10
Dennis v. *United States*, 384 U.S. 855	10
Marchetti v. *United States*, 390 U.S. 39	9
Minor v. *United States*, Nos. 189 and 271, O.T. 1969, decided December 8, 1969	9
Murphy v. *Waterfront Commission*, 378 U.S. 52	7, 8, 9

Constitution, statutes and rules:

U.S. Constitution, Fifth Amendment	4
Federal Communications Act, Section 409, 66 Stat. 721, as amended, 47 U.S.C. 409	2, 4, 9
18 U.S.C. 401	2
18 U.S.C. 3184	10
Federal Rules of Criminal Procedure:	
Rule 6(e)	10
Rule 32	2
Rule 34	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 9a-17a, 18a) is reported at 415 F. 2d 1165. The memorandum opinion of the district court (Pet. App. B 6a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1969. A petition for rehearing was denied on October 17, 1969. The petition for a writ

of certiorari was filed on November 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a grand jury witness who has been granted immunity from prosecution under 47 U.S.C. 409 may refuse to answer questions propounded to him on the ground that his answers may tend to incriminate him in a foreign jurisdiction.

2. Whether the other issues raised relating to the validity of the indictment and the voluntariness of the plea of guilty were properly resolved against petitioner by the court below.

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the Northern District of Ohio to an indictment under 18 U.S.C. 401, charging him with contempt of court for willful and knowing refusal to obey an order of the district court to answer questions before a federal grand jury investigating interstate gambling activities (A. 13-14; R. 1-2).[1] He was sentenced to three years' imprisonment, to commence upon the expiration of a federal sentence then being served (A. 30; R. 38).

The present proceeding was begun by a motion under Fed. R. Crim. P. 32(d) to set aside the plea of guilty on grounds of manifest injustice and by a mo-

[1] "A" designates the Appendix on file with this Court; "R" refers to the certified record also on file with the Clerk.

tion under Fed. R. Crim. P. 34 for arrest of judgment. In these motions and the accompanying affidavits (A. 33-34, 35-38, 39-52), petitioner and his counsel alleged, in essence, that petitioner had not in fact pleaded guilty to the indictment; that the indictment was fatally defective in that it did not set forth facts sufficient to establish an offense; that his waiver of counsel in these proceedings was not made intelligently and with a full understanding of his rights; and that since petitioner's refusal to answer questions before the grand jury related only to the period he had resided in Canada and since a federal grant of immunity could not bar a prosecution by Canada, petitioner was legally entitled to remain silent as to such questions, a right he had not at the time realized he had (A. 47-48).

The district court denied both motions (A. 53-55, 56; Pet. App. B 6a-8a). The court of appeals affirmed (R. 25; Pet. App. B 9a-17a). A petition for rehearing was thereafter filed asserting, *inter alia*, that the grant of immunity was legally insufficient because it did not immunize petitioner "from incriminating himself with regard to the period of time he lived in Canada * * *" (R. 27d). The court denied the petition with a brief order deleting the statement in its original opinion that there was no argument before it that the "proffer of immunity was not legally sufficient." It substituted for that finding the conclusion that "There is no validity to the argument that the proffer of immunity was not legally sufficient" (R. 28; App. B 18a).

The relevant facts relating to this issue are as follows: [2]

On February 14, 1968, petitioner appeared before a grand jury in the United States District Court for the Northern District of Ohio which was investigating the use of telephones in interstate commerce in connection with gambling activities. After being advised of his Fifth Amendment privilege to remain silent and of his right to have an attorney of his choice present outside the grand jury room (G 3-4),[3] petitioner invoked the privilege and refused to answer several questions relating to whether, in the period of 1960 to 1963, he made telephone calls from Canada and elsewhere to various named individuals with respect to wagering activities (G 4-6). He was advised by government counsel after these refusals that if he were to testify he would "be immune from prosecution for any matter, transaction or thing about which your testimony is compelled" under Section 409(l) of the Federal Communications Act, 66 Stat. 722, 47 U.S.C. 409(*l*) (G 6).[4] Petitioner per-

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[2] The facts relating to the claim that the indictment was insufficient, that petitioner's plea of guilty was involuntary and that his waiver of counsel was not intelligently made are fully set forth in the opinions below (Pet. App. B 6a-17a).

[3] "G" designates the transcript of petitioner's three appearances before the grand jury. We are filing a copy of this transcript herewith.

[4] This section provides:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Com-

sisted in his refusal to respond, and was brought before the district court (A. 4).

Government counsel advised the court of what had transpired in the grand jury room and requested that, in light of the grant of immunity, petitioner should be directed to answer all questions asked of him (A. 4-5). Petitioner advised the court that he had told the grand jury he "would not answer any questions of the years [he] lived in Canada, on grounds it might tend to incriminate me, but on every day I lived in the United States I will answer anything they want" (A. 6). The district judge responded (A. 6-7):

> Under our law, * * *, if a man is compelled to testify before a grand jury, then he cannot be prosecuted for anything arising out of the matter concerning which he has testified.
>
> In other words, he is granted immunity. Constitutional protection is thus accorded to him.

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mission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

> In other words, a man can't be compelled to give testimony which tends to incriminate him; but if the testimony is not going to incriminate him, because he is granted immunity when he gives it, then he cannot refuse to give it.
>
> If he does refuse, it lays him open to charges of contempt of court which can carry very severe penalties.

After further colloquy in which petitioner reiterated his claim that he felt he did not have to testify "in the American court" about anything he "did in Canada" (A. 7), the court again explained that petitioner could not "stand on the Fifth Amendment with respect to these matters because [he was] being granted immunity—in other words, the Fifth Amendment does not give a man a right not to talk when he is being protected from incriminating himself. If he can be safeguarded from incrimination, which the statute provides, then he can't invoke his Fifth Amendment rights" (A. 8). After further discussion the court once again advised petitioner that if a witness "has information which they [the grand jury] seek, then he cannot withhold it on the ground that it might tend to incriminate him if he is granted immunity from his own self-incrimination" (A. 10). The court thereupon "unequivocally" directed petitioner "to return to the grand jury room and to answer any questions put to [him] by the government attorneys" (A. 11, 12).

Petitioner was returned to the grand jury room. Before any questioning commenced, government counsel offered to permit him to consult with an attorney of his choice or have the court appoint an attorney

for him. Petitioner responded that he could "afford an attorney and I don't want anybody" (G 8). He was then again advised that if he did testify he could not "be punished in any way on anything about which [his] testimony is compelled" (G 13). He nonetheless continued in his refusal to respond (G 11-12, 15).

The following morning he was again brought before the grand jury and again advised that if he heeded the order of the court he could not be prosecuted. He still persisted in his refusal to answer the questions directed at him (G. 16-19). The indictment was thereafter returned and the plea of guilty was offered and accepted (A. 15-28, A. 29-31). At the time of the taking of the plea, it was again explained to petitioner "that if he answers the questions put to him he would be immune to anything he answered, anything that arises from what he has answered" (A. 27, A. 28).

ARGUMENT

1. Petitioner argues that the grant of immunity offered to him was legally insufficient under *Murphy* v. *Waterfront Commission*, 378 U.S. 52, in that it "could not immunize him from prosecution in Canada" (Pet. 16, see also, Pet. 17). Petitioner was not, however, entitled to such immunity.

Murphy involved only the question of whether witnesses called before a state investigatory body could properly assert their right to silence after having been given immunity from state prosecution, on the ground that their answers would tend to incriminate

them under federal law. *Murphy* determined "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" (378 U.S. at 79). *Murphy* thus did not hold that an immunity statute, to be effective, must bar *prosecution* by the federal government of a witness who testified in a state proceeding; much less did it suggest that this Court was attempting to limit the prosecutorial authority of a foreign state—a limitation which, of course, this Court has no power to effectuate. It held only that, if the statute was to be effective, the compelled testimony and its fruits must be kept from use in any federal or state prosecution which did occur.

Assuming that *Murphy* does stand for the proposition that a witness, such as petitioner, is constitutionally entitled to rest on his Fifth Amendment privilege unless the grant of immunity prohibits the government from turning over his testimony or any fruits thereof to foreign authorities,[5] there was no violation of that principle in

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[5] The *Murphy* decision does not necessarily compel such a broad reading. While it is true that this Court's opinion, after an analysis of the English precedents, concluded that the "separate sovereignty" doctrine of self-incrimination was historically unsound (see 378 U.S. at 58-63), its conclusion was reached within the context of our federal system. And, as Mr. Justice Harlan pointed out in his concurring opinion, the ruling "that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any

this case. There is no suggestion here that the danger of prosecution under foreign laws is "real and appreciable"—a factor which the Court in *Murphy* deemed significant in the English cases it cited for the proposition that an individual may properly assert the privilege because of the threat of foreign prosecution (See 378 U.S. at 67-68, at 61 n.7). Cf. *Marchetti* v. *United States*, 390 U.S. 39, 48; *Minor* v. *United States*, Nos. 189 and 271, O. T. 1969, decided December 8, 1969. Petitioner has never indicated under what laws of Canada he fears prosecution or what factors his fears are based on—whether, in short, the dangers of incrimination are " 'real and appreciable' and not merely 'imaginary and unsubstantial' * * *," *Marchetti*, *supra*, 390 U.S. at 48; nor is there any indication that petitioner will soon come within the jurisdiction of Canada, another factor stressed in *Murphy* (378 U.S. at 67). He is presently serving an eighteen month sentence on another federal charge, and there is no suggestion that Canada is seeking his extradition.

Furthermore, as we read the record made on this issue before the district court (see *supra*, pp. 5-7), the court was of the view that the immunity extended to petitioner included the protection that any answers

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manner by federal officials in connection with a criminal prosecution against him" (see 378 U.S. at 79) did not have to be bottomed on constitutional grounds, but could have been enforced through the supervisory power of this Court over federal prosecutions (see 378 U.S. at 80, 81-82, 91-92). Be that as it may, there is no reason to reach the question as to the precise impact of *Murphy* in this case for, as we point out in the following text, even read broadly *Murphy* does not aid petitioner's case here.

he might give could not be used by the federal authorities in any affirmative way—that is, that they could neither use them themselves, nor turn them over to any government, whether state or foreign. Since grand jury testimony may be disclosed only if the district court finds a particularized need, Fed. R. Crim. P. 6(e); *Dennis* v. *United States*, 384 U.S. 855, 869-870), any danger petitioner might face that his testimony would be turned over to Canada is marginal. And since extradition proceedings are in the nature of criminal proceedings, at which "the evidence of criminality may be heard and considered," 18 U.S.C. 3184, with a view to determining whether there is competent legal evidence to justify apprehension and commitment for trial in the foreign country, *Collins* v. *Loisel*, 259 U.S. 309, it is apparent that the immunity statute bars consideration either of the grand jury testimony or of any evidence secured as a result of that testimony in determining whether to grant any extradition request that might be made.

2. As to the other claims raised in the petition—(1) that the indictment was insufficient; (2) that petitioner's plea of guilty was unknowing and involuntary and (3) that his waiver of counsel was not intelligently made—we rely on the comprehensive opinion of the court of appeals, which shows the insubstantiality of these contentions (Pet. App. B 9a-17a).[6]

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[6] For example, that court pointed out that petitioner was advised at least ten times of his right to counsel; was offered a delay in the proceedings so that he could consult with an attorney; and was further advised that, if he chose, counsel

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

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would be appointed to represent him. In each instance he refused these offers. And although petitioner now makes much of the fact that when the plea of guilty was originally entered by him, he said "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to" (A. 22), the court of appeals pointed out that this was not the end of the matter. The district court adjourned the proceedings in order to obtain a presentence report, and give petitioner "a right to change [his] mind and purge [himself] of contempt" (A. 27). Two days later when asked by the court if he wished to withdraw his plea, petitioner stated: "I pleaded guilty to not obeying your order. I still stand on it (A. 30; see Pet. App. B 14a-15a).

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